

[Board of Supervisors– Post Employment Health Plan, Powers, Fringe Benefits, Compensation]

**Opinion No. 98-001**

Richard Vanderheiden  
Chairman-Deferred Compensation Committee  
c/o Maricopa County Public Fiduciary  
111 West Monroe  
Phoenix, Arizona 85003

January 5, 1998

**SYLLABUS:**

Additional legislation is necessary to give a county board of supervisors authority to offer a Post Employment Health Plan to county employees.

Dear Mr. Vanderheiden:

We have received and reviewed your question concerning the establishment of a Post Employment Health Plan (PEHP). This plan is offered by the Public Employees Benefit Services Corporation (PEBSCO), which is the marketing arm of Nationwide Insurance, and is presently the County's source of deferred compensation. You ask whether a county in Arizona can offer such a health plan under existing law, or whether a statutory amendment is required.

The PEHP presently designed by PEBSCO enables an employer to deposit funds on a regular basis in an account for each employee in a voluntary employees' beneficiary association formed pursuant to 26 U.S.C.A. § 501(c)(9).<sup>1</sup> These funds are to be used by that employee only upon retirement, and then only for health benefits. 26 C.F.R. § 1.501(c)(9)-1. Such funds are not subject to F.I.C.A. taxes when deposited, and are completely free of federal taxes if used for health benefits after the employee retires. 26 U.S.C.A. § 105(b).

County boards of supervisors have only those powers that have been expressly conferred, or, by necessary implication, delegated to them by the state legislature. The burden falls upon the county to demonstrate that it has authority to take this action. *Marsoner v. Pima County*, 166 Ariz. 195, 801 P.2d 430 (App. 1990).

A.R.S. §§ 11-401 and 11-409 authorize a county board of supervisors to appoint employees and pay them salaries. A.R.S. § 11-251(51) authorizes a board of supervisors to provide county employees with fringe benefits, including sick leave, personal leave

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<sup>1</sup>According to an information sheet provided to County Counsel by PEBSCO, the voluntary benefits association is a trust administered by the National Association of Police Organizations (NAPO) as the trustee.

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vacation and holiday pay, and jury duty pay. The question is whether these three statutes give a county board the power to offer a PEHP as part of the employees' salary and/or fringe benefits. The answer is no. A.R.S. § 11-263 specifically authorizes a board of supervisors to adopt a system of health, life, accident, and/or disability insurance for the benefit of current and former county employees. But, A.R.S. § 11-263(D) expressly prohibits a county board from using public funds to pay health premiums for retirees<sup>2</sup>.

Additional legislation is needed to lift this prohibition. Moreover, it is reasonable to conclude that the legislature would not have enacted A.R.S. § 11-263 if it considered A.R.S. § 11-251(51) sufficient to provide a county board with the authority to offer health plans, whether for current or retired employees.

For these reasons, it is our opinion that before a county board of supervisors can offer a PEHP, there must be legislation authorizing a board to offer such a benefit to its employees.

Very truly yours,

RICHARD M. ROMLEY  
MARICOPA COUNTY ATTORNEY  
DIVISION OF COUNTY COUNSEL

Sandor Shuch  
Deputy County Attorney

Approved by the Opinion Review  
Committee of the Maricopa County  
Attorney's Office the 5th day of  
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REQUEST NO. 97-PF26

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<sup>2</sup>A.R.S. § 11-263 provides in pertinent part that:

...  
B. The board of supervisors may enter into agreements to establish group health and accident coverage for former county employees who are retired and receiving income from a retirement program of this state and their dependents...

...  
D. No public funds shall be expended to pay all or any part of the premium of insurance pursuant to subsection B.